IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.47 OF 2001

Smt. Albertina Rosy Fernandes,
major, married, wife of Manuel
Fernandes, resident of Annie -
N - Menka Apartments,
Vidyanagar, Gogol, Margao,Goa
through her Attorney, her son
Shri Royson Fernandes ... PETITIONER

VERSUS

1. Shri Camilo Fernandes,
major, Civil Contractor,
resident of Chinchemorod,
Colva, Salcete, Goa;

2. Shri Antonio Joaquim
Filomena Jacinto Piedade
de Melo, major, resident
of H.No.8,
Sarvoddem, Navelim,
Salcete, Goa;

3. Smt. Vatsala Kashinath
Borkar, major, married,
resident of Annie - N -
Menka Apartments,
1st Floor, Flat No.4,
Vidyanagar, Gogol,
Margao, Goa ... RESPONDENTS.

Shri F.N. Tavora, Advocate for the Petitioner.

Shri F.M. Reis, Advocate for the Respondent No.2.

CORAM : V.C. DAGA,J.

DATED : JULY 5, 2002

ORAL JUDGMENT

Heard parties.

2. This revision petition is filed against the impugned Order dated 22nd July 1999 passed in Special Civil Suit No.5/91-B refusing to grant adjournment to the plaintiff and proceeding to dismiss the suit in default inspite of presence of the plaintiff in the Court.

3. The present Petitioner/original Plaintiff filed a Special Civil Suit No.5/91/B which came to be allotted to the Additional Senior Civil Judge, Margao. On 22nd July, 1999, the suit was fixed for Plaintiff's evidence. The Plaintiff was present in the Court through her duly constituted and authorized attorney and prayed for adjournment on the ground that she left the house in hurry due to heavy rains with the result she came to the Court without carrying original documents with her. The Plaintiff was therefore required to seek an adjournment. However, this adjournment was refused by the trial Court by Order dated 22nd July, 1999. With the rejection of the application, the trial Court dismissed the suit of the Plaintiff in default without proceeding to decide the suit on its own merits.

4. The Plaintiff probably under wrong legal advice moved application for restoration of

suit on 19-8-1999 being Civil Miscellaneous Application No.430 of 1999/I, which ultimately, came to be dismissed by Order dated 19th January, 2000. An appeal preferred against this Order bearing A.F.O. No.37 of 2000, ultimately, came to be withdrawn realising that there was no necessity to move such an application for restoration of suit and further realising that the order impugned in the appeal would be of no consequence. Under the legal advice the Plaintiff was advised to challenge the Order dated 22nd July 1999 and consequent Order of dismissal of suit in default. That is how this revision came to be filed to challenge the Orders dated 22nd July 1999 and prayer is made to restore the suit to the file of trial Court with direction to proceed with the trial of the suit on its own merits.

5. The learned Counsel appearing for the Petitioner contended that it was not open for the trial Court to dismiss the suit in default i.e. for want of prosecution when the plaintiff was present in the Court. In his submission looking to the provision of Order XVII, Rule 3, it was obligatory on the part of the trial Court to proceed to decide the suit on merits when the plaintiff was present in the Court. No suit could

have been dismissed in default or for want of prosecution, especially, when the Plaintiff was present. He further pointed out that the application under Order IX, Rule 9 was misconceived as Order IX , Rule 9 contemplates restoration of a suit dismissed in default for want of the presence of the plaintiff. In his submission since the Plaintiff was present in the Court, the suit could not have been dismissed in default or for want of prosecution. At the most, the trial Court could have proceeded to decide the suit on merits and in that process it was open for trial Court to reject the claim of the plaintiff or dismiss the suit for want of proof or evidence in support of the suit claim. Nonetheless such dismissal would have been on merits of the suit. This course of action was open to the trial Court but it was not open to dismiss the suit in default, especially, when the plaintiff was present when the suit was called out.

6. While dismissing the suit the learned Judge appears to have taken recourse to Order XVII Rule 3(b) r/w Rule 2 of Order XVII and proceeded as if the plaintiff was absent, when instead recourse ought to have been taken to Order XVII Rule 3(a) CPC, since the plaintiff and her counsel were

present when the suit was called out.

7. Order XVII Rule 3(a) of CPC lays down that if any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith, if the parties are present.

8. In the Full Bench judgment rendered in the case of **M.S. Khalsa v/s Chiranji Lal** reported in AIR 1976 All 290(FB), it has been held that Rule 3 of Order XVII would apply in a situation where a party is present and has defaulted in doing the acts mentioned in Rule 3 and that Rule 2 of Order XVII r/w Order IX would apply in a situation where a party fails to appear on the adjourned date. The view has been reiterated by the decision rendered in the case of **Kuri Lal Rungta v/s Smt. Banarsi Devi & ors. reported in AIR 1986 All 94.**

9. The meaning of the expression "forthwith" used in Order XVII Rule 3(a) CPC also fell for consideration in the Full Bench decision

in **M.S. Khosla's case (AIR 1976 All 290)** (supra) and it was held that the expression cannot be understood to mean that he suit ought to be decided on the same day as a penalty for default. It was observed thus:-

> "..... the Court can decide the suit by proceeding with the suit forthwith by determining the issues, giving findings and then pronouncing judgement accordingly. The phrase 'proceed to decide the suit forthwith' in Rule 3 appears to be somewhat similar in its import to Order XV Rule 3. The word 'forthwith' qualifies the word 'proceed' rather than the word 'decide'. All that the rule directs is that notwithstanding the default, the Court is to proceed with the further hearing or trial of the suit with a view to dispose it of, <u>if possible on that very day,</u> in accordance with law."

The above view found support also in the judgment rendered in the case of **Kuri Lal Rungta v. Smt. Banarsi Devi & ors. (supra).**

10. It follows therefore, that if on a particular date of hearing Rule 3 of Order XVII is attracted, the Court can proceed to try the suit on that day, and if for some reason it is unable to conclude the hearing or decision of the suit on that day, the further hearing could be adjourned to

another day and the party who had defaulted on the previous date will be entitled to participate in the proceedings though it will not be allowed to put the clock back by seeking to do what it ought to have done on the previous date. This is the proposition flowing from the Full Bench judgment of the Allahabad High Court reported above and quoted at para 22 of AIR 1986 All 94 (supra).

11. By dismissing the suit straightaway after disallowing the application for adjournment, the learned trial Judge appears to have erred seriously in comprehending the word 'forthwith' used in Order XVII Rule 3 as a mandate to deeded the suit on the same day as a penalty for default. The learned Judge while dismissing the suit on the ground of 'non prosecution' did not proceed to 'decide the suit' in the manner envisaged by Rule 3(a) of Order XVII viz. by determining the issues arising in the suit, giving findings and then pronouncing judgement accordingly, but instead of passing the impugned order on merits summarily dismissed the suit in default on the same day even though the Plaintiff was present in the Court when the suit was called out.

12. The learned Counsel for the

Petitioner also relied upon the judgment of this Court in the case of **Namdeo Sakharam Meshram v. Motilal Udaichand Jain (AIR 1975 Bom. 191) wherein** this Court had an occasion to observe as under:-

> "....It is obvious logically that when Order 17, Rule 3, which is one of the rules dealing with adjournments, enables the Court to proceed to decide the suit forthwith, it confers a discretion to hear the suit and pronounce the judgment of either without adjourning it or after adjourning it at some other day. ... ...
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> ... ...
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> ... Rule 3 of Order 17 posits a stage that when any party to the suit has been given time to produce a evidence or to cause the attendance of witnesses or to perform any other act necessary to the further progress of the suit for which time was allowed the Court is enabled, notwithstanding the failure of the party to do so, to proceed to decide the suit forthwith. On its plain reading, Rule 3 enables the Court to refuse an adjournment. It is really a positive power which is inherent in the Court which is clearly spelt out by the latter clause where the rule says that notwithstanding such default, the Court would be able to decide the suit forthwith. In other words, the Court may refuse an

> adjournment to the party seeking time to produce the evidence or to keep his witnesses ready in attendance or to do anything which was necessary for the further progress of the suit for which already an adjournment was granted. More or less, therefore, the provisions of Rule 3 are distinct in purpose and clearly enabling in nature. They cannot be intermixed with the scheme of Rule 2 which permits the Court to proceed in the absence of the party in the manner indicated by Order 9 of the Code. Rule 3 of Order 17, on the other hand, posits a power to refuse an adjournment and to proceed to decide the suit. The entire phraseology of Rule 3 is clear and it does not mention anything about the absence of the party; on the other hand, in the context of Order 17, it permits the Court without further adjourning the suit to proceed to decide the same. Therefore, Rule 3 postulates a decision clearly on merits upon the material that may be available either for or against the suitor, whether present or absent."

13. In the submission of learned Counsel for the Petitioner, the above view of this Court is in consonance with the view taken by Full Bench of Allahabad High Court in the case of **M.S. Khosla** (cited supra). He prayed for allowing this Revision.

14. The learned Counsel appearing for the Respondents tried to support the impugned Order of

the trial Court. He could not point out or support the Order of the trial Court on the basis of any provision of the Code of Civil Procedure as to how the trial Court could have proceeded to dismiss the suit in default when the Plaintiff was very much present though through her duly constituted and authorised Attorney. The learned Counsel for the Respondents when found it difficult to support the impugned action and Order of the trial Court, proceeded to concede the submissions advanced by the learned Counsel for the Petitioner,and accepted the legal position, however prayed for costs, for the payment of which Petitioner has no objection.

15. In this view of the matter, the impugned Order rejecting the application for adjournment and consequent Order dismissing the suit is set aside by consent of parties, subject to payment of costs in the sum of Rs.500/- to the Respondents within 4 weeks from today. The deposit or payment of costs shall be condition precedent. The suit is restored to file. The trial Court is directed to proceed to try the suit on merits as expeditiously as possible, and at any rate to dispose of the suit within a period of ten months from the date of receipt of the writ of this Court.

16. In the result, Revision is allowed with no order as to costs.

V.C. DAGA,J.

ac.